No. 13388

United States Court of Appeals
For the Ninth Circuit

ROGER D. MEREDITH, *Appellant,*

vs.

HARRY LEWIS and ALFRED SCHMID and HARRY LEWIS and ALFRED SCHMID, a co-partnership, doing business as the LEWIS CONSTRUCTION COMPANY, *Appellees.*

APPEAL FROM THE DISTRICT COURT FOR THE DISTRICT OF ALASKA, FOURTH DIVISION

BRIEF FOR APPELLEES

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APPEAL FROM THE DISTRICT COURT FOR THE DISTRICT OF ALASKA, FOURTH DIVISION

BRIEF FOR APPELLEES

JURISDICTION

Appellant brought this action in the District Court of Alaska, 4th Division, for alleged damages for breach of contract. It was tried before a jury which returned a verdict in favor of appellees. Judgment was entered May 4, 1951. Notice of appeal was filed June 2, 1951. Cost bond was filed June 4, 1951.

STATEMENT OF THE CASE

Appellees, building contractors, had a contract to construct a building known as the Geophysical Institute at the University of Alaska, Fairbanks, Alaska. Appellees employed appellant by written contract "as superintendent and overseer" for said construction job "until said construction job is fully completed or until ter-

minated in the manner hereinafter provided." The employment contract provided in part as follows:

> "7. It is expressly agreed that First Parties shall have the right to terminate Second Party's employment, for inefficiency, dishonesty, misconduct, or for any cause which First Parties shall deem sufficient, by giving Second Party written, telegraphic or other notice of such termination, and Second Party's employment shall be deemed and considered terminated immediately as of receipt of notice to that effect from First Parties. In the event of the termination of Second Party's employment, Second Party shall be entitled to receive his weekly salary herein provided for, computed to the date of termination, and no other or greater amount whatever, and Second Party shall not be entitled to demand or assert any other or greater claim whatever from First Parties."

By written notice and in accordance with its terms, appellees on January 3, 1950, terminated the contract. Appellant was paid his salary to the date of termination. Appellant claimed appellees wrongfully and in bad faith, terminated his contract. By this action appellant sought damages for the claimed wrongful termination.

Appellees also had a contract to construct a utilidor for said University. Appellant claimed he was employed by oral agreement to superintend such construction upon the same terms and conditions as his written contract of employment above referred to. Appellant claimed damages for alleged wrongful termination of this agreement also.

The issue involved was whether appellees acted wrongfully and in bad faith in terminating the employ-

ment contract. The jury resolved this issue against appellant. Appellant claims error in the instructions to the jury and in the admission of evidence.

Appellant's brief does not conform to Rule 20, Subdivision 2(d) of Rules of the United States Court of Appeals, for the Ninth Circuit, in that it does not contain, (1) A specification of errors relied upon; (2) the substance of evidence admitted over objection upon which error is claimed and the grounds of the objection thereto; and (3) the instructions or portions thereof claimed to be erroneous.

SUMMARY OF ARGUMENT

1. Appellant's claimed errors should not be considered because of the failure of appellant to comply with Rule 19, Subdivision 6, and Rule 20, Subdivision 2(d), Rules of the United States Court of Appeals for the Ninth Circuit.

2. The trial court correctly construed the contract and properly instructed the jury.

3. There was no error in the admission of evidence.

4. The verdict of the jury is amply supported by the evidence.

ARGUMENT

I.

Appellant's Claimed Errors Should Not Be Considered Because of the Failure of Appellant to Comply with Rule 19, Subdivision 6, and with Rule 20, Subdivision 2(d), Rules of the United States Court of Appeals for the Ninth Circuit.

Rule 19, Subdivision 6, Rules of the United States

Court of Appeals for the Ninth Circuit, provides in part as follows:

> "In all cases, including those on petition for review to enforce or to set aside an order of a United States Board or Commission, the appellant or petitioner, upon the filing of the record in this court, shall file with the clerk a concise statement of the points on which he intends to rely."

Rule 20, Subdivision 2(d), Rules of the United States Court of Appeals for the Ninth Circuit, provides in part that briefs shall contain the following:

> "In all cases save those of admiralty, a specification of errors relied upon which shall be numbered and shall set out separately and particularly each error intended to be urged. When the error alleged is to the admission or rejection of evidence the specification shall quote the grounds urged at the trial for the objection and the full substance of the evidence admitted or rejected, and refer to the page number in the printed or typewritten transcript where the same may be found. When the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis,* whether it be in instructions given or in instructions refused, together with the grounds of the objections urged at the trial."

Appellant failed to file a statement of points on which he intends to rely, as required by Rule 19, Subdivision 6, above quoted. Appellant's claimed errors therefore should not be considered by this Court.

Williams v. Dodds, 163 F.(2d) 724.

Appellant made no attempt to comply with Rule 20, Subdivision 2(d) above set forth. His brief does not

contain any specification of errors as required by said rule. Therefore, appellant is not entitled to have his claimed errors considered by this Court.

Shanahan v. Southern Pacific Company, 188 F.(2d) 564;

Ziegler v. United States, 174 F.(2d) 439.

Appellant claims error upon the admission of evidence, but does not set out the grounds of objection urged at the trial or the full substance of the evidence admitted. With but a single exception, he makes no reference to the page number in the typewritten transcript. Appellant's complete disregard of the rules precludes him from having his claim of errors considered by this Court.

DuVerney v. U. S., 181 F.(2d) 853.

Appellant claims errors in instructions given by the trial court. However, appellant fails in his brief to set out *"totidem verbis"* the instructions complained of, nor does his brief set out the grounds of objections urged at the trial. Appellant is not entitled to have his claim of errors upon instructions considered by this Court.

Thiel v. Southern Pacific Company, 169 F. (2d) 30;

DuVerney v. U. S., 181 F.(2d) 853.

Appellant's utter disregard of the rules not only imposes undue and unnecessary difficulties upon this court, but renders it well nigh impossible for appellees to answer in an orderly manner and in the fashion contemplated by the rules. The best that appellees can do is

to ferret out and answer what appear to be appellant's contentions, hopeful that they have correctly discerned his argument. Obviously appellees cannot discuss specific assignments of error when none is set forth.

II.

The Trial Court Correctly Construed the Contract and Properly Instructed the Jury.

1. *The Contract*

The written contract of employment provided that appellees should have the right to terminate appellant's employment for inefficiency, dishonesty, misconduct, *or for any cause which appellees should deem sufficient.* The contract further provided that upon termination appellant was to be entitled to his weekly salary to the date of termination and nothing more. It is admitted that appellant was given written notice of termination on January 3, 1950, and that he was paid his weekly salary in full to that date.

2. *The Pleadings*

In his amended complaint, paragraph X, appellant alleged that appellees wrongfully and in bad faith, and without cause, and for the sole purpose of evading payment of money due him, terminated his contracts. These allegations were denied by appellees. By his said allegations, appellant affirmatively undertook to prove that the termination was wrongful and assumed the burden of proof with respect thereto. The jury resolved this issue against appellant and specifically found that the termination was not wrongful.

3. *The Evidence*

There is abundant evidence in the record to support

this finding of the jury. The evidence discloses many things which constitute sufficient grounds for termination. Chief among these was the fact that appellant was incurring excessive labor costs (Tr. 1085. See note below).

Under appellant's supervision of the Geophysical Institute job, that job was going steadily in the hole (Tr. 609), and on December 18, 1949, the labor costs to appellees exceeded their estimate by $50,118.16 (Tr. 606). The job was not yet finished. After appellant was discharged in January, 1950, appellees incurred an additional payroll of $29,800.00 (Tr. 640, 620). Complaint was made to appellant in July of 1949 that he was running the job in the hole and was exceeding the labor cost estimate (Tr. 703, 718). At the time appellant was terminated he was told that the main reason for his discharge was the excessive labor cost (Tr. 615).

Certainly, the incurring of such excessive labor costs was ample ground in itself for terminating appellant's contract. Particularly were appellees justified in complaining about labor costs in view of appellant's representation that his labor costs would be $25,000.00 less than appellees' estimate (Tr. 610).

Many other things occurred which contributed to appellee's dissatisfaction with appellant's performance of

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NOTE: The record in this case consists of four volumes. The first volume is the Clerk's transcript of the record. Volumes 2, 3 and 4 are the transcript of the testimony. In referring to the transcript of the testimony in this brief, appellees use the designation Tr. so as to indicate pages in the transcript contained in volumes 2, 3 and 4 of the record.

his contract. If not singly, then certainly cumulatively, they constituted sufficient ground for terminating the contract. Without attempting to detail all, brief reference is made to some of them:

Overhead expense. Appellant incurred excessive overhead expense during the progress of the work (Tr. 662).

Waste of topsoil. Under the terms of its construction contract, appellees were required to preserve the topsoil if any was available. Appellant was so instructed. Contrary to his instruction he failed to do so. This resulted in substantial unnecessary expense (Tr. 581-587).

Excavation. Under appellant's supervision the excavation work was originally made in the wrong place and had to be corrected (Tr. 331).

Failure to work concrete properly. The Geophysics Building was a concrete structure. It was necessary to set up an efficient system for mixing the concrete, conveying the same to the upper stories and accomplishing the pour in the constructed forms. Appellant was instructed as to the system the appellees desired to use. Appellant was wholly unable to make efficient use thereof, thereby incurring much additional cost and delay (Tr. 592, 665, 980).

Improper walls. In the construction of the cement walls, forms were first built into which the concrete was to be poured. The form had to be constructed in such manner as to contain the concrete without bulging and the pouring had to be made so as not to cause or permit bulging. The forms were improperly constructed and the cement improperly poured, with the result that the walls bulged and were "wavy." It was necessary for

workmen to trim the wall by chipping off a great deal of the cement where the bulges occurred. Much expense was incurred in doing this work. At the time of the trial, the building had not yet been accepted by the governmental agency for which it was built, and doubt existed as to whether the walls would be approved (Tr. 668, 672, 697, 885, 983-4, 1044).

Reglets. Under the specifications of the construction contract, reglets were required to be installed. Under appellant's supervision they were improperly installed and had to be corrected (Tr. 674, 1077).

Coloring floors. Under the specifications of the construction contract, the cement floors were required to be colored. The coloring was to be mixed with the cement. Appellant neglected to have his done and it had to be corrected by subsequently coloring the floors (Tr. 674).

Balustrade. The plans required a balustrade to be constructed along the stairway. Under appellant's supervision it was improperly built and had to be rebuilt (Tr. 673).

Delay in forwarding bills. Under the appellee's method of doing business, when deliveries were made at the job and a bill was received, it would be checked by the appellant. Appellant was then required to forward the bills to the Seattle office of appellees from whence all payments were made. Appellant neglected to forward bills in a timely manner with the result that the appellees' credit was impaired (Tr. 985-6-8).

All of the foregoing bore directly upon appellant's method of performing his contract. A number of matters came to the appellees' attention bearing upon ap-

pellant's personal conduct. Appellees were aware of these things and considered them in arriving at their decision to terminate appellant's employment. They consisted of the following:

Fishwheel incident. During the time that appellant was superintending the project, a gold strike developed known as the "Fishwheel Gold Strike." Appellant and one Remling, a sub-contractor on the Geophysical job, jointly interested themselves in a gold claim. In connection therewith appellant absented himself from his job and spent time at Fishwheel (Tr. 959, 1089, 1396, 1403).

N.S.F. checks. Appellees received reports that during the progress of the job appellant issued checks in connection with his personal affairs which were returned by the bank because of insufficient funds (Tr. 905).

Soliciting co-signature of notes. Appellees received reports that appellant had solicited, and induced, subcontractors to co-sign appellant's personal notes given for his own benefit (Tr. 905).

Improper charges to the job. Appellant obtained a drill for use in connection with the Fishwheel venture. He had the drill stored and caused the storage to be charged to appellees (Tr. 1096).

Gambling. Appellees received reports that appellant attended gambling establishments and engaged in gambling while under contract with appellees (Tr. 1085-86, 704).

The evidence discloses that appellees were not alone

in their dissatisfaction with appellant. The Government inspector upon the Geophysical job was dissatisfied to the point where he wanted him removed and even considered seeking action through Washington, D. C., to accomplish his removal (Tr. 727, 993).

The enumeration of the foregoing by no means exhausts the list of things considered by appellees in arriving at their decision to terminate the contract. An examinaion of the voluminous transcript of the testimony in this case reveals considerably more than has been outlined above. The matters were factual and being in dispute, it was within the province of the jury to determine them. Their determination by the jury, made pursuant to proper instructions, is conclusive.

4. *The Law*

The contract reserved to appellees the right of termination for any cause which they deemed sufficient. It is the settled law that such a provision permits the employer to terminate the contract at any time so long as he acts in good faith. The employer is the sole judge and the court cannot substitute its judgment for that of the employer. The only issue is the good faith of the employer. The following citation from page 4 of appellant's brief confirms this rule:

> "Good Faith. A reservation of the right to discharge for reasons of the sufficiency of which the employer reserves the right to be the sole judge does not give the employer the right to terminate the contract without a reason or for a false reason, but if exercised in good faith his judgment is not reviewable. 39 C.J., Section 61, p. 73. *American Music Stores v. Russel,* 232 Fed. 306."

A clear statement of this rule is found in 35 Am. Jur. 463, Sec. 28, under the title "Master and Servant":

> "It is generally conceded that a contract by which one agrees to employ another as long as the services are 'satisfactory,' or which is otherwise expressed to be conditional on the satisfactory character of the services rendered, gives the employer the right to terminate the contract and discharge the employee whenever he, the employer, acting in good faith, is actually dissatisfied with the employee's work. Even though the parties to the employment contract have stipulated that the contract shall be operative during a definite term, if it provides that the services are to be performed to the satisfaction of the employer, the employment may be terminated by him at any time if he in good faith becomes dissatisfied with the services of the employee. In neither case is it necessary that there exist real or substantial grounds for the employer's dissatisfaction. Under such an employment contract, the employer is the sole judge as to whether the services are satisfactory; the court cannot substitute its judgment as to the reasonableness of the grounds of dissatisfaction. However, while it is not essential to the existence of the right to discharge the employee that the employer have any real or substantial ground for dissatisfaction, yet he must act honestly and in good faith. His dissatisfaction, to justify the discharge, must be real and not pretended; it must not be capricious or mercenary or the result of a dishonest design to be dissatisfied in any event. If he feigns dissatisfaction and dismisses the employee, the discharge is wrongful. While a jury may not pass upon the reasonableness of the employer's dissatisfaction, it is proper to submit to them, where the evidence is conflicting,

> the questions whether the expressed dissatisfaction is genuine or merely feigned, and whether it was the cause of the employee's dismissal."

This text lists many citations. For additional cases announcing this rule see:

Amrican Music Stores v. Kussell (CCA. 6th) 232 Fed. 306;

Ferris v. Polansky (Md.) 59 Atl.(2d) 749;

Cressey v. International Harvester Company (CCA 9th) 206 Fed. 29;

Cooper v. Singer (N.J.) 191 Atl. 849;

Olson v. Arabian American Oil Co. (D.C.N.Y.) 97 F.Supp. 801.

5. *The Instructions*

The court instructed the jury in accordance with the rule above stated. Appellant complains of the court's instructions. However, in most instances he does not identify the instruction complained of nor does he set any forth. It is therefore exceedingly difficult for appellees to reply to the arguments. The only logical procedure appears to be to answer the arguments *seriatum* in the order they appear in appellant's brief.

Appellant's first complaint seems to be directed to the instruction wherein the court construed the contract and submitted to the jury the issue of whether appellees acted in good faith in terminating the contract. It is the universal rule announced by the text writers and cases that the term "any cause deemed sufficient" embodied in an employment contract gives the employer an absolute right to terminate the employment as long as

he acts in good faith, and that the only issue to be submitted to the jury is the good faith of the employer. The instruction complained of is clearly in conformance with this universal rule.

Appellant argues that the trial court shifted the burden of proof and instructed the jury that appellant must prove that the allegations of the answer were false. There is no such instruction in the record. The court set forth in its instructions the allegations of the complaint and stated that the burden was upon appellant to prove his allegations by a preponderance of the evidence. This is clearly a correct statement of the law. It is so fundamental that a plaintiff must prove the allegations of his complaint that further comment would seem to be unnecessary.

Appellant claims that the trial court did not instruct the jury properly upon the matter of preponderance of evidence. The record amply demonstrates that this contention is without merit. Instruction No. 14 of the trial court is as follows:

> "Whenever in these Instructions I have stated that the burden of proof was upon a party to prove any issue, it shall be deemed to mean that such issue must be proved by a preponderance of the evidence, and that if the evidence as to such issue is equally divided, or preponderates to the contrary, the Jury should find that issue against the person having the burden of proof."

Instruction No. 16 reads as follows:

> "You are instructed as follows:
>
> "1. That by 'preponderance of evidence' is meant the amount of evidence which taken on the

whole, produces the stronger impression upon the minds of the jury and convinces them of its truth when weighed against the evidence in opposition thereto; * * *

"3. That it is manifestly impossible for the Court to cover the law of this case in a few instructions and that, therefore, you should consider all the instructions together and not disconnectedly; * * *."

It is apparent that the trial court clearly, succinctly and properly instructed the jury with respect to the term "preponderance of the evidence."

Appellant argues that the trial court improperly instructed the jury relative to the consideration of hearsay evidence. This argument is apparently directed against instruction No. 2. Appellant's exceptions upon this matter appear in the transcript of the record at pages 1451 and 1452. After calling the court's attention to the particular instruction, counsel for appellant stated as follows:

"Mr. Parrish: We feel you should state it should be considered only for the purpose it was admitted for. It was admitted for a special purpose and should be considered only for the special purpose."

And the court then stated,

"The Court: I will cross out 'or otherwise,' and have written after hearsay, 'which was admitted in evidence to the extent for which it was admitted.' All right." (Tr. 1452)

Thereafter the court instructed the jury as follows:

"The Court: Ladies and gentlemen of the jury, on page 2 of my instructions in the next to the last sentence of the fourth paragraph on that page,

after the word 'hearsay,' I have crossed out the words 'or otherwise' and have interlineated the following words, 'which was admitted in evidence to the extent for which it was admitted.' " (Tr. 1463)

No exception was thereafter taken to the corrected instruction of the trial court. It thus appears from the record that the trial court complied with appellant's request and reframed its instruction to meet the objection of appellant.

The court had admitted some evidence, referred to as hearsay evidence, which was limited to the sole purpose of its bearing on the good faith of appellees. The trial court was painstaking in cautioning the jury that such evidence was to be considered only for this limited purpose. By its instructions the court made it crystal clear that the jury could consider this testimony only insofar as it bore upon the question of good faith.

Appellant attacks the court's instruction to the effect that Roy Johnson was not authorized to make an employment contract with appellant as to the utilidor job.

Appellant alleged that he was employed by oral agreement to superintend the construction of the utilidor. Appellant's testimony relative to this oral agreement was as follows:

"Q. Now, what arrangements did you make with Mr. Johnson in regard to that work?

A. Only that I asked Mr. Johnson if Lewis had said anything about my percentage continuing through and he said, 'Your percentage will continue through.' He didn't say Lewis said so. He inferred my percentage would go through on that job.

Q. What percentage do you mean?

A. Well, my salary wasn't to be changed, but I was to receive 20% of any profit that I—any cost savings I effected under Mr. Johnson's estimate and at the time Mr. Johnson says, 'If you can do it like you think you can, you've got a nice piece of money.'

Q. Did you ever discuss that arrangement that you had with Mr. Johnson with Mr. Harry Lewis?

A. Not with Mr. Lewis, but with Alfred Schmid." (Tr. 31-32)

Later, when testifying about the oral agreement, appellant testified as follows:

"A. I mean just exactly and specifically this, Mr. Cottis: That Mr. Schmid knew, and Mr. Johnson knew that I was doing that work fully expecting to be paid for it on any savings effected under the contract, and I told Roy Johnson when he made the bid and I helped him to make the bid which was later awarded to the Lewis Construction Co. that by no—that let there be no mistake about it, I was not going to do that work without compensation for it. Now, on no subsequent visit by Schmid or Johnson did they ever tell me that I was not to receive that 20 per cent. Now, is that clear in your mind, Mr. Cottis?" (Tr. 1376-1377)

The Lewis Construction Company was a co-partnership consisting of Harry Lewis and Alfred Schmid. The witness, Roy Johnson, testified:

"A. Well, no particular arrangement other than what I stated yesterday that Dick wanted to know if he was going to get his 20 per cent cut on it, and I told him as far as I was concerned it was all right, but I did not have the authority to make such a deal

with him, and he would have to take it up with Harry Lewis or Al Schmid." (Tr. 712)

Alfred Schmid testified that he never made any oral agreement with appellant for the utilidor job. Admittedly the appellant did not discuss the matter with Harry Lewis. The verdict of the jury included a special interrogatory with answer, as follows:

"Q. No. 6. Has it been proved by a preponderance of the evidence in this case that in the month of May or June, 1949, the plaintiff and Lewis Construction Company through Alfred Schmid, partner, entered into an oral agreement wherein plaintiff agreed to act as superintendent of construction on the utilidor job and Lewis Construction Company agreed to pay him therefor 20% of any savings made between the estimated cost of said job and the actual cost thereof?

A. No."

The testimony is clear that Roy Johnson did not have any authority to make such an agreement with appellant and there is nothing in the evidence from which any such authority could be inferred. Appellee Alfred Schmid testified that the only authority Johnson had with respect to the utilidor job was the authority given him to submit a bid. Johnson had no authority to enter into any agreement of employment with appellant (Tr. 871-873). The witness, Johnson, testified that the only authority he had with respect to the utilidor job was authority to submit a bid. He denied that he represented himself as having any other authority in the matter whatsoever (Tr. 711). The record is devoid of any evidence from which it could be implied that Johnson had

any authority to make an employment agreement with appellant. It is noteworthy that appellant testified with respect to his relations with Johnson as follows:

> "A. No, but I didn't consider them my bosses. I had to get along with them and try to get the job up for them, but no one ever told me that Roy Johnson was ever my boss." (Tr. 437)

On page 5 of his brief appellant cites *Standard Accident Insurance Co. v. Simpson,* 64 F.(2d) 583. The citation quoted deals with secret limitations on the authority of an agent. It has no relation whatever to the question of implied authority of an agent. Appellant refers to no testimony, and indeed none can be found in the record, of any secret limitation of authority of Mr. Johnson. The case cited is clearly inapplicable to the situation here.

The foregoing covers all of the arguments made by appellant respecting the court's instructions as far as appellees have been able to discern. As previously mentioned, it is most difficult for appellees to answer appellant's arguments because of appellant's failure to assign specific errors and to set out the instructions complained of. Appellant's criticism of the court's instructions is without foundation or merit.

III.

There Was No Error in Admission of Evidence

Appellant argues that the trial court erred in its rulings on the admission of evidence. His brief does not set out the evidence referred to nor the objections made thereto. Seemingly appellant refers to the evidence which the court admitted for the limited purpose of

showing the state of mind of appellees so as to determine their good faith or lack of good faith in terminating appellant's employment agreement. The admitted evidence had to do with reports received by appellees and related to appellant's work and personal conduct. The jury was at all times advised by the court that it could consider such evidence only for the limited purpose for which it was admitted. At various stages of the trial the court admonished the jury to this effect and called to its attention the limitation upon such evidence. Typical of the court's admonitions is the following:

> "THE COURT: Well, this will be limited for the purpose of showing the state of mind of the defendants whether they were in good faith or in bad faith in finally terminating the contract. I don't think anything except that last line is of any importance." (Tr. 1001)

Similar admonitions of the trial court appear at pages 648, 684 and 996 of the transcript.

At the trial appellant's counsel conceded the admissibility of the evidence for the limited purpose stated by the court. This is indicated by the following statement of one of appellant's counsel:

> "MR. PARRISH: I have no objection, your Honor, to him stating what he told Harry Lewis and I think he is entitled to state that, but he is not entitled to state what the facts were." (Tr. 901).

The testimony complained of was clearly admissible for the purpose of showing good faith on the part of appellees in terminating the contract.

In *Central Heights Improvement Company v. Memo-*

rial Parks, Inc., 105 P.(2d) 596, the Supreme Court of California stated as follows:

> " * * * Nor was the evidence inadmissible as hearsay because appellant was not a party to the proceedings before the corporation department. The testimony and documents were received not as evidence of the truth of the matters therein contained or stated, but as evidence of acts of respondents which were required of them under the contract, and which formed a part of the entire transaction in dispute— as distinguished from that portion alleged in the complaint. When the good faith of a party is in question, the information upon which he acted, whether true or false, is original and material evidence, and admissible."

In *McAfee v. Travis Gas Corporation* (Tex.) 153 S.W.(2d) 442, the opinion states:

> " * * * We quote the rule as announced in Jones on Evidence, *supra*:
>
> > " 'Where the question is whether a party has acted prudently, wisely, or in good faith, the information on which he acted, whether true or false, is original and material evidence, and not hearsay.' "

The foregoing authorities state the universal rule upon this subject. Appellant cited no authority whatever to the contrary.

Appellant contends that the trial court erred in admitting evidence relative to the claim of one Remling. The circumstances surrounding the Remling claim are these: Appellant claimed damages based upon the savings he would have made below the estimated cost if he had been permitted to finish the contract. Appellee Schmid was testifying as to the actual cost of construc-

tion. Remling, a sub-contractor, asserted a claim against appellees in the amount of $2,000.00 for material allegedly supplied. Demand for this amount had been made upon appellees by Remling's attorney. Schmid testified to the Remling claim as one of the items to be considered in computing the cost of construction. It was clearly material for that purpose. Furthermore, the matter is of no consequence because the jury found that the termination of the contract was warranted and that appellant was entitled to receive nothing. The question of the amount of damages therefore is immaterial.

IV.

Verdict of the Jury Is Amply Supported by the Evidence

The principal issue in this case was whether or not appellee acted in good faith in terminating appellant's employment. Appellant elected to have this issue tried before a jury. The issue was submitted to the jury under proper instructions. The jury resolved the issue against appellant.

Specific interrogatories were submitted to the jury. Amongst these and the answers thereto were the following:

> "Q. No. 1. Has a preponderance of the evidence in this case proved that the termination of plaintiff's employment by means of said termination notice (Exh. B. attached to plaintiff's amended complaint) was in good faith or in bad faith?
>
> A. Good faith.
>
> Q. No. 2. What would have been the total cost of the Geophysical Institute job if plaintiff's employment had not been terminated by defendants?
>
> A. $602,038.36.

Q. No. 6. Has it been proved by a preponderance of the evidence in this case that in the month of May or June, 1949, the plaintiff and Lewis Construction Company through Alfred Schmid, partner, entered into an oral agreement wherein plaintiff agreed to act as superintendent of construction on the utilidor job and Lewis Construction Company agreed to pay him therefor 20% of any savings made between the estimated cost of said job and the actual cost thereof?

A. No.

Q. No. 7. Was it wrongful and against the precepts of these instructions for defendants to terminate the oral agreement if there was such an agreement of employment between plaintiff and the Lewis Construction Company as to the utilidor job?

A. No."

It is thus evident that the jury found against appellant on all material points. It found that appellees acted in good faith in terminating appellant's employment. It found that appellant failed to establish an oral contract for the utilidor job. It found that even if there had been such an oral contract appellees were warranted in terminating it. It found that not only did appellant fail to effect a saving on the Geophysics job, but that his cost exceeded appellees estimate.

There was ample evidence to support each and all of the jury's findings. Brief reference has heretofore been made to some of the evidence. A reading of the record amply demonstrates that under the evidence the jury's verdict was not only proper, but in fact was the only one which it could have, in justice, rendered.

CONCLUSION

Appellees respectfully submit:

1. That appellant's claims of error should not be considered and the judgment should be affirmed because of appellant's willful disregard of the rules of this court.

2. That the trial court correctly construed the contract.

3. That the instructions were proper under the law and the evidence.

4. That there was no error in the admission of testimony or the rulings of the court thereof.

5. That the verdict of the jury is amply supported by the evidence and was proper and just under the law and the evidence.

6. That appellant has failed to establish any grounds warranting reversal.

The judgment of the District Court should be affirmed.

Respectfully submitted,

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